

Message

From: Hurl, Kathy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F3B04131F1145FCB4CCF5B0A64C1AC4-KHURLD]
Sent: 8/11/2020 1:44:33 PM
To: Zobrist, Marcus [Zobrist.Marcus@epa.gov]; Pickrel, Jan [Pickrel.Jan@epa.gov]
Subject: RE: 8/6/2020, Inside EPA: Industries Urge EPA To Maintain 'Non-Discretionary' Position On 404 Permits

Thanks Jan and Marcus!

I missed this yesterday digging out from vacation.

From: Zobrist, Marcus <Zobrist.Marcus@epa.gov>
Sent: Tuesday, August 11, 2020 8:51 AM
To: Hurl, Kathy <Hurl.Kathy@epa.gov>
Subject: FW: 8/6/2020, Inside EPA: Industries Urge EPA To Maintain 'Non-Discretionary' Position On 404 Permits

fyi

From: Pickrel, Jan <Pickrel.Jan@epa.gov>
Sent: Monday, August 10, 2020 9:28 AM
To: OW-OWM-PD-Industrial Branch <OWOWMPDIndustrial_Branch@epa.gov>
Cc: Bathersfield, Nizanna <Bathersfield.Nizanna@epa.gov>
Subject: 8/6/2020, Inside EPA: Industries Urge EPA To Maintain 'Non-Discretionary' Position On 404 Permits



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Industries Urge EPA To Maintain 'Non-Discretionary' Position On 404 Permits

August 6, 2020

Industry and free-market groups are urging EPA to maintain its current policy position that Endangered Species Act (ESA) consultations are not required before allowing states to assume Clean Water Act (CWA) wetlands permitting, and are calling on the agency to reject an alternative interpretation advanced by Florida officials.

The debate over whether the agency should reconsider its position that state assumption of CWA section 404 dredge-and-fill permitting is a non-discretionary action -- and thus no ESA section 7 consultation is required before assumption -- comes as the Florida Department of Environmental Protection (FDEP) is hoping to soon finalize the assumption process. EPA Region 4 announced Aug. 5 that it has signed a memoranda of agreement with Florida that will be one part of a larger package of documentation the state plans to send to EPA as part of a formal assumption request.

EPA's current position, outlined in a 2010 letter to the Environmental Council of the States and the Association of State Wetland Managers, relies heavily on the Supreme Court's 2007 ruling in *National Association of Home Builders v. Defenders of Wildlife*. In that case, the high court said the delegation to states of CWA section 402 permitting is mandated and non-discretionary once a state has met the criteria set forth in section 402(b). Therefore, the court said, the transfer of 402 permitting authority does not trigger ESA section 7(a)(2)'s consultation and no-jeopardy requirements.

EPA has argued the same rationale applies to 404 permitting. But the agency took comment on whether it should reconsider the issue after Florida developed a white paper contending that section 7 consultation is required in the section 404 assumption context because the unique statutory text and legislative history differ in critical respects from the 402 program.

States are split on whether Florida's interpretation is correct, and environmentalists believe ESA consultation should occur but oppose limiting that consultation to a one-time effort as Florida is also seeking.

But industry and free-market groups argue EPA's position is the correct interpretation, with the Pacific Legal Foundation arguing in July 6 comments, "There is no legally relevant distinction between the Section 402 program and the Section 404 program."

The National Association of Home Builders (NAHB) in July 6 comments says that while EPA's request for comments is compelled by FDEP's proposal, its application would apply prospectively to any state that applies to assume the program.

NAHB says it supports state assumption of the 404 program because state assumption can eliminate redundancy between federal and state permitting requirements, better align CWA programs, and expedite permit decision timeframes but that EPA should retain its current position and incorporate it into the memoranda of agreement of all states seeking assumption.

"However, should EPA reverse its position and claim that the approval process under CWA Section 404(g) or (h) is a federal discretionary action, thereby requiring all states seeking CWA Section 404(g) assumption to first undergo a programmatic ESA Section 7 consultation, it must first address a number of existing limitations regarding the ability to extend incidental take authorizations to ensure permittees can get reasonable ESA coverage," NAHB says.

"Similarly, EPA must clarify how it will approach the many legal, procedural, and technical ESA implementation issues that could present hurdles for permit applicants under state-assumed CWA Section 404 programs," the group adds.

The American Petroleum Institute (API) in July 6 comments disagrees with Florida's suggestion that EPA approval of state assumption is discretionary and triggers ESA consultation.

"API acknowledges the validity of FDEP's concern about the potential for liability under the ESA if an activity authorized under a state-issued Section 404 permit results in the take of a listed species. However, we do not believe that attempting to construct a Section 7 consultation obligation where none is required is a lawful or appropriate way of obtaining protection from this incidental take liability." -

- Lara Beaven (lbeaven@iwpnews.com)